Taylor Made Transportation Services, Inc. *and* Kimberly Tutt. Case 05–CA–036646

June 7, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On December 15, 2011, Administrative Law Judge Bruce D. Rosenstein issued the attached decision. The Respondent filed exceptions and a supporting brief. The Acting General Counsel filed an answering brief, cross-exceptions, and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order as modified and set forth in full below.[3]

We agree with the judge that the Respondent violated Section 8(a)(1) of the Act by suspending and terminating employee Kimberly Tutt, but our analysis differs slightly from the judge's. As the judge found, the record here convincingly demonstrates that the Respondent took action against Tutt because she violated the Respondent's unlawful rule against disclosing wage rates. Accordingly, this case is governed by the standard recently articulated in *Continental Group, Inc.*, 357 NLRB 409 (2011), where the Board explained that:

> [D]iscipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act.

Slip op. at 4.[4]

Here, we need not pass on the judge's finding that Tutt was engaged in protected concerted activity when she violated the unlawful rule, because Tutt clearly was "engage[d] in conduct that otherwise implicates the concerns underlying Section 7 of the Act," under the second prong of the test set forth in *Continental Group*. As the Board recently stated in *Parexel International, LLC*, 356 NLRB 516, 518 (2011),

> The Board has long held that Section 7 "encompasses the right of employees to ascertain what wages are paid by their employer, as wages are a vital term and condition of employment." *Triana Industries*, 245 NLRB 1258, 1258 (1979). In fact, wage discussions among employees are considered to be at the core of Section 7 rights because wages, "probably the most critical element in employment," are "the grist on which concerted activity feeds." *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enfd. in part 81 F.3d 209 (D.C. Cir. 1996); *Whittaker Corp.*, 289 NLRB 933, 933–934 (1988).

We find that Tutt engaged in conduct implicating Section 7 concerns by disclosing her wage rate to her fellow employees and, therefore, that the Respondent violated Section 8(a)(1) by suspending and discharging Tutt based on that conduct. We further note that the Respondent does not seek to establish an affirmative defense under *Continental Group*—i.e., that Tutt's wage-related conduct interfered with the Respondent's operations and that Tutt was suspended and terminated for such interference—nor would the record support such a defense.

ORDER

The National Labor Relations Board orders that the Respondent, Taylor Made Transportation Services, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining rules in its employee handbook that preclude employees from discussing their compensation or pay rates, and distributing memoranda to employees threatening them with discipline for violating such rules.

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[1] No exceptions were filed to the judge's findings that the Respondent violated Sec. 8(a)(1) of the Act by maintaining a handbook rule prohibiting employees from disclosing their wage rates and by distributing an April 20, 2011 memorandum threatening employees with discipline if they were to breach the rule.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We shall modify the judge's recommended Order to conform to the violations found and to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

[4] Applying *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983), the judge found that the Respondent failed to demonstrate that it would have taken the same actions against Tutt even if she had not discussed her wage rate with other employees. Assuming without deciding that *Wright Line* applies where employees have been retaliated against for violating an unlawful rule by engaging in nonconcerted "conduct that otherwise implicates the concerns underlying Sec. 7 of the Act," the Respondent failed to make the requisite showing here. We agree with the judge that the Respondent's proffered reasons for acting against Tutt were pretextual.

(b) Discharging or suspending employees who violate unlawful rules by engaging in discussion of their compensation or wage rates.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its April 20, 2011 memorandum and any rules in its employee handbook that preclude employees from discussing their compensation or pay rates and notify its employees in writing that it has done so.

(b) Within 14 days from the date of this Order, offer Kimberly Tutt reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(c) Make Kimberly Tutt whole for any loss of earnings and other benefits suffered as a result of her unlawful suspension and discharge, in the manner set forth in the remedy section of the judge's decision.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Kimberly Tutt, and, within 3 days thereafter, notify her in writing that this has been done and that the unlawful suspension and discharge will not be used against her in any way.

(e) Preserve and, within 14 days of a request or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in Baltimore, Maryland, copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 30, 2010.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 5 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

[5] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

MEMBER HAYES, concurring.

I agree with the judge's finding that, in the circumstances of this case, employee Kimberly Tutt was engaged in actual protected concerted activity when discussing her own wages with other employees, and that the Respondent unlawfully discharged her solely for this reason. Accordingly, I do not pass on whether, even if Tutt's conduct was not concerted, the discharge would be unlawful under the second prong of the test in *Continental Group*, 357 NLRB 409 (2011).

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain any rule preventing you from discussing your terms and conditions of employment, including compensation or pay rates, with other employees, or distribute memoranda to you threatening you with discipline for violating such rules.

WE WILL NOT suspend or discharge you because you violate our unlawful rules by discussing your compensation or wage rates.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind our April 20, 2011 memorandum and any rules in our employee handbook that preclude you from discussing your compensation or pay rates, and WE WILL notify all of you in writing that we have done so.

WE WILL, within 14 days from the date of the Board's Order, offer Kimberly Tutt full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL make Kimberly Tutt whole for any loss of earnings and other benefits resulting from her suspension and discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Kimberly Tutt, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the unlawful suspension and discharge will not be used against her in any way.

TAYLOR MADE TRANSPORTATION SERVICES, INC.

Patrick J. Cullen, Esq., for the Acting General Counsel.
Paul D. Shelton, Esq. and *Fabian D. Walters, Esq.,* of Baltimore, Maryland, for the Respondent-Employer.

DECISION

STATEMENT OF THE CASE

BRUCE D. ROSENSTEIN, Administrative Law Judge. This case was tried before me on October 26, 2011, in Baltimore, Maryland, pursuant to an amended complaint and notice of hearing issued by the Regional Director for Region 5 of the National Labor Relations Board (the Board). The complaint, based upon a charge filed on May 31, 2011,[1] by Kimberly Tutt (the Charging Party or Tutt), alleges that Taylor Made Transportation Services, Inc. (the Respondent or Employer), has engaged in certain violations of Section 8(a)(1) of the National Labor Relations Act (the Act). The Respondent filed a timely answer to the complaint denying that they had committed any violations of the Act.

Issues

The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by maintaining and applying overbroad and unlawful rules in its Employee Handbook that prohibited employees from discussing their compensation and pay rates. The Acting General Counsel argues that the Charging Party's suspension on April 25, and subsequent termination on April 29, resulted from her violation of the Handbook rules by engaging in protected concerted activities under the Act.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation with an office and place of business located in Baltimore, Maryland, has been engaged in the business of providing passenger transportation services to the United States Government under a contract with the Social Security Administration. Respondent, in conducting its business operations, has been engaged in providing services to the United States Government valued in excess of $50,000. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background and Facts

Since on or about November 30, 2010, Respondent in its Employee Handbook has maintained the following rule:

> NON-DISCLOSURE
>
> Such confidential information includes, but is not limited to the following examples:
>
> - Compensation data

Between on or about November 30, 2010, until on or about April 22, Respondent, in its employee handbook maintained the following rule:

> PAYDAYS
>
> All employee pay rates are confidential and should not be disclosed verbally, written, or electronically posted for deliberate expose [sic] of rates without a valid reason.
>
> This could lead to disciplinary actions up to and including termination.

Since on or about April 22, Respondent, in its Employee Handbook, has maintained the following rule:

> PAYDAYS
>
> All Taylor Made Transportation, Inc. employees are encouraged to use good judgment regarding disclosing pay rates, which could lead to additional expense and disruption for Taylor Made Transportation Services, Inc.

Since in or around April 2011, Respondent in its Employee Handbook has maintained the following rule:

> EMPLOYEE CONDUCT AND WORK RULES
>
> Taylor Made Transportation Services, Inc. expects employees to follow rules of conduct that will protect the interests and safety of all employees and the organization.
>
> The following are examples of infractions of rules of conduct that may result in disciplinary action, up to and including termination of employment:

[1] All dates are in 2011, unless otherwise indicated.

- Unauthorized disclosure of business "secrets" or confidential information.
- Disclosure of confidential pay rates without validity.

On or about April 20, Respondent published the following memorandum to its employees:

> This is a reminder that all employee pay rates are confidential. It is against company policy to disclose or discuss your pay rate weather [sic] it is verbal, written, electronically communicated or by any other means, to deliberately make others aware of your hourly rate of pay without validity.
>
> As all of our employees are valued this would unfortunately lead to disciplinary actions up to and including termination.
>
> We ask that all Taylor Made Transportation Services, Inc. employees adhere to this policy.

On April 25, the Respondent suspended the Charging Party and on April 29 she was terminated.

At all material times Allen R. Taylor has been the owner, president, and chief executive officer of the Respondent. Maryce Willis serves in the position of human resources director and James Kearney is a transportation supervisor. The Respondent, in its answer, admitted that the above individuals are supervisors and agents within the meaning of Section 2(11) and (13) of the Act.

Respondent hired Tutt on March 1, and she worked as a part-time driver at the Social Security Administration (SSA) principally driving SSA employees between buildings on their campus. Tutt remained in that assignment until on or about March 31, when she was transferred to the newly acquired contract site at the Centers for Medicare and Medicaid Services (CMS) where she provided passenger transportation services for CMS employees under the direct supervision of Kearney.[2] The transfer was not disciplinary in nature but rather was to accommodate both Tutt and the Respondent in effectuating the new contract. During the orientation training session, the CMS Supervisor Maria Fowlkes observed Tutt and some of the other employees chatting with passengers and not exhibiting a professional demeanor. Accordingly, these observations were shared with the Respondent and a brief meeting was held on April 1 with Tutt, Willis, Kearney, and Operations Manager Lionel Saxon (R. Exh. 1). During the meeting, Tutt was advised to keep a professional demeanor while representing the Respondent and to watch her conduct and conversation around clients and fellow employees.

On April 12, Willis was made aware from concerns raised by coworkers that Tutt was discussing her rate of pay with fellow employees. Since the only people that had access to that information was the employee, the Employer, and the client (CMS), Willis determined that such actions were contrary to Respondent's policies and procedures set forth in its Employee Handbook.

[2] During the period that Kearney supervised Tutt (April 1–21), he did not issue her any written warnings or impose discipline.

On April 20, by a memorandum to all employees that was stapled to their paychecks, Willis reminded the work force that all employee pay rates are confidential and it is against company policy to disclose or discuss your pay rates with the admonition that disclosure could lead to disciplinary actions up to and including termination (GC Exh. 4).

On April 20, Kearney cautioned Tutt on the usage of her cell-phone and recommended that the company cell phone be plugged into the charger instead of her personal cell phone. He documented these issues in a memorandum to Taylor dated April 22 (R. Exh. 2). Kearney testified that prior to April 20 he had cautioned Tutt on at least three occasions regarding the excessive volume of her cell phone and suggested she turn down the call alert due to its graphic language. Kearney acknowledged that Tutt complied with both of these requests and he did not inform Willis or any other supervisor about these conversations nor did he memorialize the discussions.

Tutt's last day of work occurred on April 21, as she was granted leave on April 22 to attend her sister's wedding. On April 22 Kearney met with Willis to discuss concerns about Tutt's performance.

On April 24 (Sunday), Tutt received a telephone call from Willis and was instructed to come directly to her office on April 25 (Monday), rather then reporting to work.

On April 25, Willis held a meeting with Tutt regarding her lack of professional behavior. Prior to the meeting, Willis prepared an outline of talking points to be discussed during the meeting (R. Exh. 2). During the meeting Willis reviewed Tutt's personal cell-phone usage pursuant to the April 22 memorandum that Kearney had prepared, and also informed Tutt that it had been brought to the attention of Taylor that employees were upset because Tutt had disclosed her rate of pay that was higher than some of her coworkers. Willis further informed Tutt that the entire management team was doing damage control and all employees when hired were encouraged to use good judgment regarding pay rates. At the conclusion of the meeting Willis advised Tutt that effective immediately she was under suspension until Friday, April 29, when a decision would be made regarding the above situation and her continued employment at the Respondent. Willis did not provide Tutt with a copy of the talking points nor was Tutt provided a written record of the reasons for her suspension.

On April 28 (Thursday), Willis telephoned Tutt and instructed her to be present in her office at 10 a.m. on April 29. During this meeting, Willis informed Tutt that after a thorough review of her employment history, it was decided that she was not a good fit for the Employer and that the decision was made to terminate her. According to Tutt, Willis informed her that the reason she was being terminated was due to her discussing and disclosing confidential pay rates with fellow employees that caused excessive disruption in the work force and with the client (CMS). Tutt testified that no other reasons were given for the termination including improper cell phone usage or Kearney's April 22 memorandum. Tutt further testified that toward the end of the meeting Taylor entered the office and the subject of disclosing her pay rate to employees was discussed. Taylor, while admitting that he came into Willis's office at the conclusion of the meeting, denied that he had any discussions

with Tutt concerning the disclosure of her pay rate or the reasons for her termination. Willis testified that Tutt was suspended and subsequently terminated due to inappropriate cell phone usage for which she was warned on several occasions, insubordination and solicitation of coworkers and clients for nonwork-related matters and lack of professional behavior. Tutt was not provided with any written reasons for the discharge but Willis completed a termination report that was placed in Tutt's personnel file (R. Exh. 3). That report shows that Tutt was terminated for violating policies and procedures, improper cell phone usage, and thus was no longer needed.

Shortly, after Tutt's termination on April 29, she filed for unemployment insurance with the State of Maryland's Department of Labor, Licensing and Regulation Office of Unemployment Insurance. An initial telephone interview occurred first with Tutt and then with Willis. Subsequently, a second telephone hearing occurred with a claims examiner to obtain additional information regarding the termination in which both Tutt and Willis participated (GC Exh. 5).[3] Tutt informed the claims examiner that the reason for her termination was the Employer's position that she had disclosed confidential pay rates to fellow employees. On May 6, Willis on behalf of the Employer, informed the claims examiner that on April 12 a number of employees informed her of Tutt's specific pay rate, and since only the employee, the Employer, and the client (CMS) were aware of such information, it was concluded that Tutt had disclosed her pay rate to others which was contrary to Respondent's handbook policy and was grounds for immediate dismissal. Accordingly, Tutt was terminated for disclosing her compensation to coworkers. Willis further informed the claims examiner that while Tutt received a warning for violation of its cell phone usage policy, she would not have been terminated for that offense. On May 26, Willis also informed the claims examiner that Tutt was discharged by her and Taylor for failure to follow policy in disclosing her wages.

After evaluating the evidence, the Office of Unemployment Insurance initially denied Tutt's claim finding that she had deliberately and willfully disregarded the standards of behavior in disclosing the Employer's confidential financial information, which action is considered gross misconduct.

On appeal, a hearing examiner reversed the initial decision, and Tutt was granted unemployment benefits that she continues to receive (GC Exh. 6).

The 8(a)(1) Employee Handbook Allegations

The Acting General Counsel alleges that wage discussions among employees are considered to be the core of Section 7 rights. *Parexel International, LLC*, 356 NLRB 516, 518 (2011). An employer's rule which prohibits employees from discussing their compensation is unlawful on its face. *DaNite Sign Co.*, 356 NLRB 975, 975 fn. 1 and 980 (2011), quoting *Freund Baking Co*., 336 NLRB 847 (2001); *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004).

Based on the forgoing, I find that the Respondent has violated Section 8(a)(1) of the Act by promulgating a policy that explicitly prohibits employees from discussing their compensation.

Since the Respondent's confidentiality provisions contained in its employee handbook explicitly restricts employees from discussing their compensation including pay rates it restricts Section 7 activity and would likely have a chilling effect on those rights such that the mere maintenance of those provisions violates Section 8(a)(1) of the Act even in the absence of enforcement.

Lastly, I also find that the Respondent violated Section 8(a)(1) of he Act when, on April 20, it published the memorandum set forth above that reminded employees that pay rates are confidential and if they discussed or disclosed that information it could lead to disciplinary action up to and including termination. Therefore, it follows that the overbroad confidentiality provision has been applied to restrict the exercise of Section 7 rights, and is unlawful in violation of the Act.

The 8(a)(1) Suspension and Termination Allegations

The Acting General Counsel alleges in paragraphs 10 and 11 of the complaint that the Respondent suspended and terminated the Charging Party because she violated the employee handbook rules by engaging in protected concerted activities.

The Employer defends its conduct by asserting that the employee handbook rules were not relied on when it suspended and thereafter terminated Tutt. Rather, they argue that Tutt was terminated during her probationary period due to poor performance, lack of professional behavior, and for violating the Respondent's policy regarding the usage of personal cell phones.

Discussion

The Board has held in *Double Eagle Hotel & Casino*, 341 NLRB 112 fn. 3 (2004), enfd. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006), that discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. Nevertheless, an employer will avoid liability for discipline imposed pursuant to an overbroad rule if it can establish that the employee's conduct actually interfered with the employee's own work or that of other employees or otherwise actually interfered with the employer's operations and that the interference rather than the violation of the rules, was the reason for the discipline. It is the employer's burden, not only to assert this affirmative defense as was done in the subject case, but also to establish that the employee's interference with production or operations was the actual reason for the discipline. *Continental Group, Inc.* 357 NLRB 409 (2011).

The Board has also held in *Automatic Screw Products Co.*, 306 NLRB 1072 (1992), that an employer violates Section 8(a)(1) of the Act by promulgating and maintaining a rule prohibiting employees from discussing their salaries and also by disciplining an employee for violating that rule.

The protected nature of Tutt's and other employee's efforts to protest Respondent's actions concerning the confidential nature of compensation and pay rates has long been recognized by the Board who has held that similar conduct comes within

[3] The certification of record was admitted into evidence pursuant to Rules 803(8) and 901(7) of the Federal Rules of Evidence.

the guarantees of Section 7 of the Act. See *Joseph De Rairo, DMD, P.A.*, 283 NLRB 592 (1987). The Board has also held in *Mike Yurosek & Sons, Inc.*, 306 NLRB 1037, 1038 (1992), that "individual action is concerted where the evidence supports a finding that the concerns expressed by the individual are [sic] logical outgrowth of the concerns expressed by the group." In this case, I find that Tutt's discussions, on her own and the employees' behalf, about their compensation fall within the ambit of protected concerted activity. However, it must be determined whether Tutt was suspended and thereafter terminated based on such activity.

In *Wright Line*, 251 NLRB 1083 (1980), enfd, 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board announced the following causation test in all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer decision. On such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct. The United States Supreme Court approved and adopted the Board's *Wright Line* test in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1993). In *Manno Electric*, 321 NLRB 278 fn. 12 (1996), the Board restated the test as follows. The General Counsel has the burden to persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity.

I find that the Acting General Counsel sustained his initial burden of showing that Tutt's protected activity was a motivating factor in the decision to suspend and thereafter terminate her. In this regard, Tutt engaged in protected activity by disclosing and discussing with fellow employees her compensation and pay rate, the Employer was aware of this activity, and animus against such activity was exhibited by the Employer. Moreover, the timing of Tutt's suspension and termination demonstrates animus by Taylor and Willis. Indeed, upon learning on April 12 that Tutt had disclosed her pay rate to fellow employees, they both engaged in extensive damage control to placate employees and the client whose contract comprised approximately 50 percent of the Respondent's yearly revenue.

I further find that the Respondent has not met its rebuttal burden under *Wright Line*, of showing that it would have discharged Tutt even in the absence of her protected activity. Notably, the test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). The Board has held that a finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not, in fact relied on, thereby leaving intact the inference of wrongful motive. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). In short, a finding of pretext defeats any attempt by the employer to show that it would have discharged the discriminatee absent his or her protected conduct. *Golden State Foods Corp.*, 340 NLRB 382 (2003).

I conclude that it was not until after May 31 when the subject of unfair labor practice charge was filed, that the Respondent first raised its present defense and argued that Tutt was suspended and subsequently terminated during her probationary period due to poor work performance, lack of professional behavior, and for violating its policy regarding the use of personal cell phones. That defense conflicts with the reasons provided to Tutt in her suspension and termination meetings prior to the filing of the subject charge. When an employer provides shifting reasons for discharging an employee, the Board has found that the proffered reasons are pretextual and the true reason is animus. *Seminole Fire Protection, Inc.*, 306 NLRB 590 (1992). In this regard, it is no coincidence, that shortly after Willis and Taylor learned on April 12 that Tutt had disclosed confidential financial information, a memorandum was issued on April 20 to all employees that disclosing confidential information could subject them to disciplinary actions up to and including termination. Likewise, the evidence establishes that in the suspension meeting of April 25, Willis informed Tutt that her coworkers informed Taylor that they were upset because Tutt's rate of pay was higher than theirs. I note that Willis's April 25 talking points reference Tutt's disclosure of confidential financial information.[4] Additionally, I credit Tutt's testimony that during the termination meeting on April 29, both Willis and Taylor addressed the issue of disclosing confidential financial information that was contrary to the Respondent's policy and was grounds for termination. Indeed, Tutt's termination report relies on a violation of Respondent's policies and procedures as a reason for her termination.

Lastly and particularly relying upon the admissions against interest made by Willis during the unemployment insurance hearing (GC Exh. 5), I find that the Respondent terminated Tutt for disclosing confidential financial information in violation of its Employee Handbook policy. I also note that Willis conceded that while Tutt received a warning for inappropriate cellphone usage, she would not have been terminated for that offense and she worked to the best of her ability.

In summary, I find that Tutt was terminated for engaging in protected concerted activity based on Respondent's overbroad Employee Handbook rules that precluded employees from discussing or disclosing their compensation or pay rates. Accordingly, such action violates Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By maintaining in its employee handbook provisions that preclude employees from discussing their compensation or pay rates, the Respondent violated Section 8(a)(1) of the Act. It further violated the Act by applying its Handbook rules and issuing a memorandum on April 20, 2011, to employees that restricted the exercise of Section 7 rights and threatened discipline if employees discussed or disclosed their compensation or pay rates among themselves or with other employees.

[4] I also note that the majority of the reasons advanced by Willis in her testimony for Tutt's suspension and termination do not appear in her April 25 talking points (R. Exh. 2).

3. By suspending and discharging employee Kimberly Tutt the Respondent has been interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I shall order them to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that the Respondent violated Section 8(a)(1) of the Act by maintaining overbroad handbook rules that preclude employees from discussing their compensation and pay rates, I shall order the Respondent to rescind those provisions and to notify its employees in writing, that it has done so. *Hyundai America Shipping Agency*, 357 NLRB 860 (2011). Additionally, having found that the Respondent further violated Section 8(a)(1) of the Act by suspending and discharging Kimberly Tutt, I shall order the Respondent to offer her full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent job, without prejudice to her seniority or any other rights or privileges previously enjoyed. Further, the Respondent shall make the aforementioned employee whole for any loss of earnings and other benefits suffered as a result of the discrimination against her. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010), enf. denied on other grounds sub nom. *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

The Respondent shall also be required to expunge from its files any and all references to the unlawful suspension and discharge of Kimberly Tutt and to notify her in writing that this has been done and that the unlawful suspension and discharge will not be used against her in any way.

[Recommended Order omitted from publication.]